

Editorial

Law and Time

1. One of those evergreens that time and again pose problems to lawyers is that of law and time, or time and law. Not so long ago, the Scottish Romanist Lord Rodger of Earlsferry – since deceased – wrote extrajudicially (he was a Law Lord, as his title then was): ‘For the most part, when you are simply applying the law in a routine fashion, you scarcely think of matters of time. But when something draws the question to your attention, all of a sudden you see the issue everywhere you look’.¹

2. Legislation usually does not have a retroactive effect. However, this is not wholly to be excluded. Thus, legislators all over Europe once decreed that the equality of children born within and out of wedlock, decided by the European Court of Human Rights in the *Marckx* case,² had retroactive effect until 13 June 1979, the day of the judgement. Actually, rather than giving a retroactive effect to legislation, this might also be qualified as codification of judge-made case law. Usually, legislators are no great partisans of the retroactive effect. More especially, reflective Chambers of Parliament, such as the Senate, have a thorough dislike of this technique.

3. This is different in case law. As Andrew Burrows (Oxford) writes in ‘Common law retrospectivity’ commenting upon the words of Lord Rodger quoted above: ‘Provided judicial law reform is effected, in its traditional way, by the incremental articulation and application of principle – rather than by leaping forward in response to the policies of the day – retrospective development of the common law is not merely acceptable but essential’.³ An interesting publication on the subject is that by Ben Juratowich.⁴

4. An area of the law, where matters of time often play, is that of tax law.⁵ That the subject matter is not a recent phenomenon is apparent from the paper ‘Retroactivity reconsidered’ that Tim Koopmans published in the *Cambridge Law Journal* 1980, pp. 287-303.⁶

1 ANDREW BURROWS, DAVID JOHNSTON & REINHARD ZIMMERMANN (eds), *Judge and Jurist/Essays in Memory of Lord Rodger of Earlsferry* (Oxford: University Press, 2013), p. 543.

2 No. 6833/74.

3 *Ibid.*, pp. 543-558.

4 BEN JURATOWICH, *Retroactivity and the Common Law* (Oxford: Hart, 2008), p. 270.

5 HANS GRIBNAU & ALLARD LUBBERS in the volume by PATRICIA POPELIER *et al.* (red.), *The Effects of Judicial Decisions in Time* (Cambridge: Intersentia, 2014), p. 285.

6 TIM KOOPMANS, ‘Retroactivity Reconsidered’, *Cambridge Law Journal* 1980, pp. 287-303.

5. Three references should suffice to show that the subject still inspires more recent research. In 2010, Marie Cresp defended her interesting PhD thesis on *Le temps juridique*.⁷ In 2014, Trix van Erp-Jacobs devoted her Tilburg valedictory lecture to ‘a question of time’.⁸ In July 2014, Eva Steiner presented to the *Académie internationale de droit comparé* her general report on ‘Judicial rulings with prospective effect’, which later this year will be published by Springer.

6. What does this issue of ERPL encompass? First, we carry three articles. The first one is by Paula Giliker (Bristol) who analyses the difficulties of the transposition of the Consumer Rights Directive into UK law. One of the main difficulties is that of implementing a maximum harmonization directive. The author concludes that the British government has been very willing to implement the directive. However, it has done so by using a ‘copy out technique’ meaning that the directive’s provisions have been placed in low visibility secondary legislation. The result has been fragmentation and the existence of overlapping layers of domestic and European laws.

7. The second article, by Matteo Fornasier (Max Planck Institute Hamburg), deals with the impact of EU fundamental rights on private relationships. Do such rights have a direct or indirect effect in private relations. The author argues that this actually is an important question in commercial long-term contracts as organizational tools and the principles of good faith. According to some commentators, the European Court of Justice supports the notion of a direct horizontal effect.

8. Our third article, by Leuven’s Jacques Herbots, is on OHADA, the *Organisation pour l’Harmonisation en Afrique du Droit des Affaires*. Of all the world’s regional entities, apart from the European Union, the OHADA is by far the most interesting one. Not only has it uniform legislation in place, it also possesses a *Cour de cassation* in Ivory Coast’s Abidjan. Having originated as an organization of former French colonies and dependencies, it has now moved into Portuguese and Spanish and even into English language (Cameroun) territories. The author gives an overview of the various OHADA uniform acts. Current legislative acts seem to be running somewhat out of steam. The paper focuses on the law of the Congo, where Herbots himself once taught contract law.

9. Case notes have often been described as the trademark of ERPL. We are therefore glad once again to offer a case note. On 10 October 2013, the Supreme Court of Portugal (*Supremo Tribunal de Justiça*) rendered a judgement in a case on change of circumstances, which may be of interest to other jurisdictions as well. Coordinated by Dr. Rodrigo Momberg (Oxford), five jurisdictions, apart from

7 MARIE CRESP, *Le temps juridique/Essai d’une théorie générale* (Presses Universitaires Aix-Marseille, 2013), p. 452.

8 TRIX VAN ERP-JACOBS, *Een kwestie van tijd* (Universiteit Tilburg, 2014), p. 36.

that of Portugal, are analysed. Three of these jurisdictions are open legal systems⁹ and two are closed,¹⁰ as to the question of whether a contract may be adjusted or terminated in case of change of circumstance.¹¹ The interesting point in this particular case, as Dr. Momberg shows is that, neither the open nor the closed legal systems would follow the Portuguese decision.

10. What may readers expect from future issues? No less than three Specials are in the making. Since two of these are supposed to be still surprises for the addressees - although this Editorial may already arouse their curiosity ('will it be for me?') - the subject matter will remain in suspense.

*Ewoud Hondius**

9 Germany (Juan Dastis), Italy (Rossella Esther Cerchia), and Spain (Juan Pablo Murga Fernandez).

10 Belgium (Denis Philippe) and France (Suzanne Lequette).

11 EWOUND HONDIUS & HANS CHRISTOPH GRIGOLEIT, *Unexpected Circumstances in European Contract Law* (Cambridge: University Press, 2011), p. 692.

* The first part of this Editorial is based on a column published earlier, in Dutch, in the student monthly *Ars Aequi*.